SAKINAS SDN BHD

v.

SIEW YIK HAU & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[CIVIL APPEAL NO: R1-11-139-2000]
19 MARCH 2002

CIVIL LAW ACT: *Assignment - Whether deed of assignment an absolute one or by way of charge only - Civil Law Act 1956, s. 4(3)*

CONTRACT: *Sale and purchase of property - Late delivery of vacant possession - Claim for compensation - But notice of intention to claim compensation not given - Whether breach of s. 56(3) Contracts Act 1950*

CONTRACT: *Damages - Late delivery of vacant possession of property - Whether actual loss or damage must be proved - Contracts Act 1950, s. 75*

LAND LAW: *Housing developers - Damages for late delivery - Whether right of purchaser to sue prejudiced by assignment of purchaser's rights under sale and purchase agreement to financier - Whether deed of assignment an absolute one or by way of charge only - Whether notice to claim compensation should be given - Whether actual loss or damage must be proved - Civil Law Act 1956, s. 4(3) - Contracts Act 1950, ss. 56(3), 75*

The respondents were granted summary judgment in the magistrate's court in respect of their claim for damages against the appellant developer for late delivery of vacant possession of an apartment purchased by them and for failure to complete the common facilities in time. Hence, the appellant's appeal against the summary judgment.

The appellant claimed that the respondents did not have the right to sue the appellant as the respondents had assigned their rights under the sale and purchase agreement of the apartment to their financier, CCM *via* a deed of assignment. Further, the respondents did not give the appellant notice of their intention to claim compensation for late delivery and that contravened s. 56(3) of the Contracts Act 1950 ('the CA'). The appellant also argued that the respondents had not adduced evidence of the actual loss or damage suffered by them as a result of the delay in completion.

Held:

[1] To fall under s. 4(3) of the Civil Law Act 1956 ('CLA'), the assignment must be an absolute assignment and must not purport to be by way of charge only. All the terms of the deed of assignment must be considered, and if, upon consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor (*Nouvant Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd*). The actual phraseology does not matter. Therefore, this could be taken to mean that even if the assignment were to use the word "absolutely", it would not fall within s. 4(3) of CLA if the intention was to give a charge only. (p 281 d-f)

[2] The assignment herein was an alternative form of security necessitated by the fact that the apartment had no title to enable it to be charged under the National Land Code as security. If the apartment had a title, the title would have been charged under the National Land Code as security for the loan and there would have been no need for an assignment. The assignment was a second best substitute for a charge because a charge was not yet possible and it therefore served the same kind of purpose as a charge. When title was eventually available, the apartment would be charged and the assignment would cease. The deed of assignment stipulated that the apartment was intended as a security for the loan. The assignment being intended as a security, and for no other purpose, could rightly be said to purport to be by way of charge only. Therefore, despite it purporting to be an absolute assignment, it did not fall within s. 4(3) of CLA. (p 282 d-f)

[3] By not objecting or by consenting to the respondents suing for compensation, CCM must be taken to have relinquished any interest in the compensation. That being the case, there was no possibility of CCM bringing an action to claim the compensation or of it succeeding in recovering the compensation from the appellant after the respondents have succeeded in doing so. Its interest was only in the apartment as security. Its only concern was to sell it should the respondents default under the loan agreement. Suing for the compensation for the delay would not benefit CCM. Compensation rightly belonged to the respondents. Neither could the respondents compel CCM to sue because of cl. 2 of the deed of assignment which stipulated that CCM was not obliged to enforce the terms of the agreement. (pp 286 e, h & 287 d)

[4] If the respondents were held to have no *locus standi* to sue, it would be manifestly unjust to them. They would only be able to sue when the assignment came to an end, *ie*, when they would have settled their loan or when the apartment became charged under the National Land Code upon the issue of title to it, whichever would be the earlier. By that time their suit might encounter problems of limitation. (p 287 d-e)

[5] As the intention of the appellant and the respondents was that time should be of the essence of the contract, the agreement became voidable at the option of the respondents when the appellant failed to deliver vacant possession on 13 December 1997. However, s. 56(3) of CA did not apply unless when the contract became voidable on 13 December 1997, or soon after that, the respondents indicated to the appellant that it was acceptable to them if the appellant fulfilled its promise at some other time. There was no evidence as to that. (pp 288 a & 289 c)

[6] The Federal Court in *Selva Kumar Murugiah v. Thiagarajah Retnasamy* did not rule that in every case falling under s. 75 of CA, there must be proof of actual loss or damage. A case in delay of completion such as the present case does not require proof of actual damage or loss. There has to be real loss that is not too remote, but it is difficult for the court to assess the actual loss because there is no known measure of damages employable. What the court needs to determine, in the absence of proof of actual loss, is reasonable compensation, applying good sense and fair play. (pp 291 a & 292 a-b)

[7] The sale and purchase agreement in this case was a mandatory one prescribed by statute. The method of calculating the liquidated damages for failure to hand over vacant possession in time was prescribed in the agreement by regulations made by the Minister. The method, being prescribed by subsidiary legislation, was incapable of overriding s. 75 of CA and its effect. As such, the liquidated damages prescribed in the agreement constituted reasonable compensation and the respondents ought to be given it in full to the limit prescribed. (p 292 c & g)

[Appeal dismissed.]

Case(s) referred to:

Chan Min Swee v. Melawangi Sdn Bhd [2000] 7 CLJ 1 ***(refd)***

Durham Brothers v. Robertson [1898] 1 QB 765 ***(refd)***

Loh Hoon Loi & Ors v. Viewpoint Properties (Sabah) Sdn Bhd [1995] 4 MLJ 804 ***(refd)***

Max-Benefit Sdn Bhd v. Phuah Thean An & Anor [2001] 2 CLJ 70 ***(refd)***

Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 65; [1985] CLJ (Rep) 231 ***(refd)***

Pak Ki Yau & Anor v. Kumpulan Promista Sdn Bhd [1999] 4 CLJ 205 ***(refd)***
Philleoallied Bank (Malaysia) Bhd v. Bupinder Singh Avtar Singh & Anor [1999] 2 CLJ 1023 ***(refd)***
Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 ***(refd)***
Tan Yang Long & Anor v. Newacres Sdn Bhd [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666 ***(refd)***
Three Rivers District Council & Ors v. Governor and Company of the Bank of England [1996] QB 292 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 4(3)
Contracts Act 1950, ss. 56(3), 75(1)
Housing Developers (Control and Licensing) Regulations 1989, reg. 11, sch H

Courts of Judicature Act 1873 [UK], ss. 25(6), 26(6)

For the appellants - David Lee (IN Jeganathan); M/s SK Yeoh & Jeganathan
For the respondents - Amir Nordin; M/s Khairuddin Ngiam & Tan

Reported by Usha Thiagarajah

JUDGMENT

Abdul Aziz Mohamad J:

This appeal from the Magistrate's Court concerns the performance of a sale and purchase agreement dated 14 October 1994 ('the agreement') whereby the appellants, who were developing a condominium, agreed to sell an apartment in the condominium to the respondents and the respondents agreed to purchase it. The agreement was in accordance with that prescribed under reg. 11 of, and in Schedule H to, the Housing Developers (Control and Licensing) Regulations 1989 made under the Housing Developers (Control and Licensing) Act 1966, as the mandatory contract for the sale and purchase of a housing accommodation.

There was failure on the part of the appellants to hand over vacant possession of the apartment in time and there was a corresponding failure to complete the common facilities in time. The delay was 336 days in both cases, reckoned from the date when vacant possession should have been delivered to the date when it was actually delivered. For failure to hand over vacant possession in time, cl. 22(2) of the agreement provided that "the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price". The purchase price was RM167,000. For failure to complete the common facilities in time, cl. 24(1) provided for the payment of liquidated damages in the same terms and at the same rate, but of 20% of the purchase price, not of the full purchase price.

The respondents brought an action in the Magistrates Court to claim damages under the two clauses. Under cl. 22(2) the amount claimed was RM15,373.15. Under cl. 24(2) it was RM3,074.63. They applied for summary judgment and succeeded. Thus the instant appeal.

The appellants rely on three grounds for maintaining that summary judgment ought not to have been granted. They are grounds of law.

First Ground: Assignment

To finance the purchase of the apartment, the respondents obtained a loan from a finance company, Credit Corporation (Malaysia) Berhad ("CCM"). Because an individual strata title had not been issued for the apartment to enable it to be charged under the National Land Code as security for the loan, CCM entered into a deed of assignment with the respondents which, according to recital (4), CCM had agreed to accept as a security for the loan.

What the respondents assigned, according to cl. 1, were their "entire rights title and interests in and to the said property and the full and entire benefit of the sale agreement together with the full benefit granted thereby and all stipulations therein contained and all remedies for enforcing the same". Clause 1 says that the respondents assigned them "absolutely". Those are benefits and rights. As to burdens, cl. 2 provides that the assignees, CCM, shall not "be required or obligated in any manner to observe or perform any of the conditions or obligations of the assignor(s) under or pursuant to the sale agreement". The burdens therefore remained with the respondents. Moreover, even as to benefits, cl. 2 also provides that CCM were not required or obligated "to present or file any claim, or to take any other action to enforce the terms of the sale agreement". Thus although "all remedies for enforcing the (agreement)" had been assigned to CCM purportedly "absolutely", they were not obliged to seek those remedies. So although the right to sue for compensation for delay to complete had been assigned to them, they were not obliged to do so.

Clause 7 provides that the deed of assignment shall be revoked by the registration of a first legal charge over the apartment in favour of CCM. The respondents would then have become the registered owners of the apartment. The assignment having then come to an end, the respondents' rights under the agreement would automatically revert to them.

The assignment was made on 19 May 1995. The respondents commenced their action on 31 December 1998. On 7 July 1999, CCM wrote to the respondents, in response to their letter dated 30 June 1999, to "confirm that we have no objection to your intention to initiate legal action against the developer pursuant to the sale and purchase agreement dated 14 October 1994". That was before the respondents filed their application for summary judgment and the appellants filed their statement of defence.

The appellants' counsel argued that the respondents did not have the right to sue under the agreement because that right had been assigned by them to CCM and it does not matter if the assignment was absolute or by way of charge. He argued that for the respondents to be able to sue, the right to sue must be reassigned to them, if the assignment was absolute, or the respondents must join CCM, if it was an equitable assignment. As to CCM's consent, he submitted that it was not for the current action but for an intended action in the future and that in any case mere consent is insufficient.

I think what learned counsel for the appellants meant to say was that whether or not the assignment fell within s. 4(3) of the Civil Law Act 1956 the respondents had no right to sue because what we are concerned with here is not the assignment of a debt or a chose in action but one aspect of the entire assignment, namely the assignment of "all remedies for enforcing the same" or, to put it simply, the right to sue. The implication is that if what we were concerned with here was the assignment of a debt or chose in action, then it would make a difference whether or not it fell under s. 4(3).

Although the right to sue is included in the subject of the assignment, I do not think it is right to single it out and give it a treatment of its own as a thing assigned, and a treatment, at that, that is unrelated to the nature of the assignment of the debt or chose in action that is the primary subject of the assignment. That is because, to my understanding, the position as to the right to sue must depend on, and is the consequence of, the nature of the assignment of the primary subject. Take the case of an assignment that falls within s. 4(3), which provides, as far as material, as follows:

> (3) Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, ... shall be, and be deemed to have been, effectual in law ... to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

It can be seen that the passing and transfer of "all legal and other remedies" follows the passing and transfer of the legal right to the debt or chose in action as a consequence of the nature and incidents of the assignment. Legal and other remedies, which import the right to sue, do not have to be included in the subject of the assignment, and I do not think it should make any difference in the position as to the right to sue if in a particular assignment, as in this case, the right to sue happens to be included within the scope of the subject of the assignment. So I think it is necessary to determine whether the assignment in this case, which is not an assignment of a debt but is an

assignment of a chose in action, falls within s. 4(3) because, if it falls within s. 4(3), then the respondents, being the assignors, do not have the right to sue.

To fall under s. 4(3), the assignment must be an absolute assignment and must not purport to be by way of charge only. In *Durham Brothers v. Robertson* [1898] 1 QB 765, Chitty LJ, speaking of s. 26(6) of the Judicature Act 1873, which was the precursor of our s. 4(3), said at p. 771: "It is requisite that the assignment should be, or at all events purport to be, absolute, but it will not suffice if the assignment purport to be by way of charge only". I would take that to mean that even if an assignment purports to be absolute it does not fall within s. 4(3) if it also purports to be by way of charge only.

In *Nouvau Mont Dor (M) Sdn. Bhd. v. Faber Development Sdn. Bhd.* [1985] 1 CLJ 56; ([1985] CLJ (Rep) 231) Seah FJ, delivering the judgment of the Federal Court, said at p. 60 (p. 234):

> It is plain that in every case of this kind, all the terms of the instrument must be considered; and whatever may be the phraseology adopted in some particular part of it, if, on consideration of the whole instrument, it is clear that the intention was to give a charge only, then the action must be in the name of the assignor.

It is a statement of principle about an assignment that would not fall within s. 4(3). The emphasis is on finding a clear intention to give a charge only upon consideration of all the terms of the instrument. The actual phraseology does not matter. I would take that to mean that even if the assignment were to use the word "absolutely" it would not fall within s. 4(3) if the intention was to give a charge only. There is substantial consistency in implied meaning between that statement and Chitty LJ's statement that I quoted before.

As a statement of principle about an assignment that would fall within s. 4(3), Seah FJ went on to say:

> While, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within section 25 and the action must be brought in the name of the assignee.

The question that I need to consider now is whether the assignment falls within s. 4(3). Is it an "absolute assignment ... not purporting to be by way of charge only"? In *Max-Benefit Sdn Bhd v. Phuah Thean An & Anor* [2001] 2 CLJ 70, where the assignment was in terms and circumstances similar to that in this case, Vohrah J (as he then was) held that the assignment did not fall within s. 4(3) because it was in effect not absolute but was conditional as it was merely to secure a loan and therefore was by way of charge only. In

Chan Min Swee v. Melawangi Sdn Bhd [2000] 7 CLJ 1, where the assignment was also to provide security for a loan pending the registration of a charge when title to the property was eventually issued, and where the purchaser-assignor sued the developers, the developers were not prepared to submit that the assignment was an absolute assignment. See p. 13 b-c. The case was considered on the basis that the assignment did not fall within s. 4(3). In that case, three cases were cited where the High Court held that the assignment, which was made for the same purpose and in the same circumstances as those in this case, did not fall within s. 4(3) either because it was not an absolute assignment or because it was by way of a charge. The cases are *Pak Ki Yau & Anor v. Kumpulan Promista Sdn Bhd* [1999] 4 CLJ 205, *Loh Hoon Loi & Ors v. Viewpoint Properties (Sabah) Sdn Bhd* [1995] 4 MLJ 804, and *Tan Yang Long & Anor v. Newacres Sdn Bhd* [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666.

I think there are good grounds for saying that the assignment in this case, whether or not it is an absolute assignment, is by way of charge only and therefore does not fall within s. 4(3). The assignment is an alternative form of security necessitated by the fact that the apartment had no title to enable it to be charged under the National Land Code as security. If the apartment had a title, the title would have been charged under the National Land Code as security for the loan and there would have been no need for an assignment. The assignment is a second-best substitute for a charge because a charge is not yet possible and it therefore serves the same kind of purpose as a charge. When title is eventually available, the apartment would be charged and the assignment would cease. Recital (4) in the deed of assignment says that it is intended as a security for the loan. The assignment being intended as a security, and for no other purpose, it can rightly be said to purport to be by way of charge only.

However, in *Nouvau Mont Dor, supra,* where the assignment clause was in the same terms as those in this case and the reason for and purpose of the assignment were the same, the Federal Court held that the assignment was an absolute assignment and not purporting to be by way of charge only. This is what Seah FJ said at p. 61 (p. 235):

> Looking at the whole document of February 18, 1978 and bearing in mind the provision of section 6 of the Act, in our opinion, the document was an absolute assignment and not purporting to be by way of charge only within the meaning of section 4(3) of the Civil Law Act 1956. The assignment was in terms absolute in the sense that the assignor (appellant) intended to pass and transfer to the assignee (Public Bank) absolutely the beneficial interest as well as all the rights title and interest in the Sale Agreement dated April 1, 1977 and the remedies of enforcing them. The instrument clearly purported and

was intended in point of form, to be an absolute assignment because of the use of the word "absolutely" in clause 1 thereof (see Fry LJ in *Comfort v. Betts (supra)* at page 74.) If the assignment was an absolute one (not purporting to be by way of charge only) the fact that it had the effect of passing to the assignee the rights title and interest of the assignor in the Sale Agreement and the beneficial interest of the assignor in the said property under the said Sale Agreement by way of security only did not derogate from the absolute character of that assignment *(Hughes v. Pump House Hotel Co. (supra)* and *Comfort v. Betts (supra)*).

From the last sentence I gather that the Federal Court recognised that the assignment was by way of security. I am unable to say whether the Federal Court viewed that fact as being tantamount to the assignment purporting to be by way of charge. What is clear is that to the Federal Court it did not matter that the assignment was by way of security. What mattered was the fact that the assignment was an absolute assignment. Even though it was by way of security, it remained an absolute assignment, and being an absolute assignment it fell within s. 4(3). It almost seems as if to the Federal Court the phrase "not purporting to be by way of charge only" does not constitute a separate requirement but is one that depends on whether the assignment was an absolute assignment. In other words, an absolute assignment cannot at the same time be one that purports to be by way of charge only. If it is an absolute assignment, it is not necessary to consider whether, by virtue of its being by way of a security, it is also one that purports to be by way of charge only, because being an absolute assignment, it cannot be seen as purporting to be by way of charge only, but has to be seen as not purporting so to be. That is what I would, from the passage, conclude the thinking of the Federal Court to be. As to why the Federal Court concluded that it was an absolute assignment, the understanding that I form from the second and third sentences is that to the Federal Court "the assignor (appellant) intended to pass and transfer to the assignee ("Public Bank") absolutely ..." because of the use of the word "absolutely" in the assignment clause.

In that passage the Federal Court was actually applying the principles in evaluating the particular document before it. If my understanding of the thinking in that passage and my understanding of the statement of principle in the passage that I have quoted is correct, there appears to be an inconsistency between the statement of principle and the manner in which it was applied to the particular document. I am faced with the choice of either following the perceived thinking that went into the evaluation of the particular document or following the statement of principle, and I think the correct course is to follow the statement of principle.

Like Vohrah J in the *Max-Benefit* case, I see the assignment in this case as clearly intended to give a charge only in spite of its purporting to be an absolute assignment. It therefore does not fall within s. 4(3). It being clear that the intention was to give a charge only, it cannot at the same time be the intention to pass all the rights of the assignor so as, according to the statement of principle, to render the assignment one falling within s. 4(3).

I would mention that in *Philleoallied Bank (Malaysia) Berhad v. Bupinder Singh a/l Avtar Singh & Anor* [1999] 2 CLJ 1023, which involved an assignment that purported to be an absolute assignment and that was in terms similar to those in this case, the Court of Appeal held that the assignment was an equitable charge.

The assignment not falling within s. 4(3), what then is the position as to the right to sue? The position will be as what it was before the enactment of s. 25(6) of the Judicature Act 1873. The law then was as thus stated by Chitty LJ at pp. 769 and 770 of *Durham Brothers, supra*:

> As is well known, an ordinary debt or chose in action before the Judicature Act was not assignable so as to pass the right of action at law, but it was assignable so as to pass the right to sue in equity. In his suit in equity the assignee of a debt, even where the assignment was absolute on the face of it, had to make the assignor, the original creditor, party in order primarily to bind him and prevent his suing at law, and also to allow him to dispute the assignment if he thought fit.

Although the second sentence in the passage speaks of the assignment of a debt, it should apply equally, in my opinion, to the assignment of a chose in action. The state of the law as revealed by the passage focuses on the freedom to sue of the assignee, not the assignor. The assignee was not free to sue for the debt. He had to make the assignor a party, and the reason he had to make the assignor a party was one that had the protection of the debtor in mind, that is, to prevent the assignor also suing the debtor at law. The fact that if the assignee wanted to sue he had to join the assignor so that the assignor would be prevented from suing implies that otherwise the assignor would have a right to sue for the debt. This implication is fortified when consideration is given to Chitty LJ's saying that the assignment did not pass the right of action at law, but only passed the right to sue in equity. What happened then to the right of action at law? It could only have remained with the assignor.

In the passage earlier cited in *Nouvau Mont Dor, supra*, Seah FJ said that "the action must be in the name of the assignor", which I would take to mean by the assignor in his name. It cannot mean by the assignee in the name of the assignor because then the position would be no different from that under

an assignment that falls within s. 4(3), where, the action should be brought by the assignee in his own name or "by the assignee in the name of the assignor".

In the *Max-Benefit* case, *supra*, Vohrah J held that since the assignment did not fall within s. 4(3), the assignee bank had no *locus standi* to sue, and therefore the assignors had the *locus standi* to sue.

With those authorities to rely on, the assignment in this case not falling within s. 4(3), I should have been disposed to hold that the respondents had the right to sue and could exercise that right even without the consent of CCM the assignee.

But there are authorities that say otherwise. These authorities were considered by Abdul Malik Ishak J in *Chan Min Swee, supra*, with the resulting conclusion that the position at common law is that the assignor cannot sue without joining the assignee.

There is, however, of the judgment, an enlightening passage from the judgment of Staughton LJ in *Three Rivers District Council And Others v. Governor And Company Of The Bank Of England* [1996] QB 292. It is as follows:

> The issue is, whether the assignor of a chose in action retains a cause of action, when the assignment is equitable. All are agreed that, as a procedural requirement, he may if the court thinks fit be compelled to join the assignee as a party; so too an equitable assignee who sues alone may be required to join the assignor. In either case the effect is to avoid double jeopardy, to save the debtor from the risk that he may have to pay twice.

It implies that an assignor may sue alone, but the court if it thinks fit may compel him to join the assignee. The court may not think fit to so compel him. The compulsion is only a matter of procedural requirement, not one that reflects absence of *locus standi*, and the reason for the compulsion is to save the debtor from the risk of having to pay the same debt twice. It would follow that if there is no such risk, there is no reason to compel the assignor to join the assignee and he should not be so compelled and he may sue alone.

It is therefore necessary to consider whether, should the respondents recover compensation from the appellants, there would be a risk that CCM would sue the appellants for the same compensation by virtue of the assignment and would succeed, so that the appellants would have to pay it again to CCM. This requires a consideration of the effect of CCM's letter of no objection of 7 July 1999.

Learned counsel for the appellants submitted that because the letter was given after the respondents commenced their action against the appellants and referred to "your intention to initiate legal action" and not to the action that had been initiated, the letter was meant for some other action in the future and not for the current action.

It is true that the letter did not specifically point to the action that the respondents had commenced. It was in response to a letter of the respondents dated 30 June 1999. What action CCM intended in their letter can only be conclusively determined by a perusal of the respondents' letter, which has, unfortunately, not been exhibited. But CCM's letter was exhibited in connexion with para. 6 of the respondents' affidavit dated 15 March 2000 to support the respondents' averment in that paragraph that they had the capacity to bring the present action, which averment was made in response to the appellants' contention that the respondents had no capacity because of the assignment, and in that paragraph the respondents affirmed that the letter gave them consent to bring the current action. I take the respondents' word for it. I reject the possibility that the respondents had exhibited a letter meant otherwise than for the current action. I also take it as a certainty that in their letter to CCM the respondents informed CCM of the purpose of the action, that is, to recover compensation for delay in completion.

By not objecting or by consenting to the respondents' suing for compensation, CCM must be taken to relinquish any interest in the compensation. That being the case, I am unable to see the possibility of CCM bringing an action to claim the compensation or of their succeeding in recovering the compensation from the appellants after the respondents have succeeded in doing so.

In any event, the letter of consent apart, I am unable to see CCM ever wanting to sue the appellants for compensation for delay in completion. They have indicated in cl. 2 of the deed of assignment that they are not obliged to enforce the terms of the agreement. That clause must have been inserted out of fear that the respondents would compel them to sue the appellants for any breach, such as the breach in this case, and the fear must have arisen from the recognition that the benefit of such a suit would not be theirs but the respondents'. And that is so because their interest is only in the apartment as security. Their only concern is to sell it should the respondents default under the loan agreement, so as to recover the loan. Had there been a title, the apartment would have been charged, and there would have been no assignment of the respondents' rights under the agreement and there would have been no question of CCM suing the appellants under the agreement. That would also be the position when title is eventually available. The apartment would be charged and the assignment would cease and there would be no question of

CCM suing the appellants for anything under the agreement. The ultimate security for CCM is a charge, having which, they would have no involvement with the agreement. They would have no need – indeed they would not be able – to sue the appellants for compensation for late completion. It cannot be that having an assignment as an alternative security CCM would have need to sue the appellants for such compensation.

I am, therefore, confident that if the respondents succeeded in recovering compensation from the appellants, there would be no risk that CCM will also sue the appellants for the compensation or that they will succeed. The respondents may therefore sue the appellants without being required to join CCM. I do not think CCM are interested in the compensation. Their only concern is that the respondents service the loan faithfully. If the respondents should default, they will resort to a sale of the apartment to recover the loan. Suing for the compensation for delay will not benefit CCM because, for one thing, I think that CCM recognise that the compensation rightly belongs to the respondents, and CCM are not likely to take on a suit that will not benefit them. Neither can the respondents compel them to sue, because of cl. 2. So if the respondents were to be held to have no *locus standi* to sue, it would be manifestly unjust to them. They would only be able to sue when the assignment comes to an end when they have settled their loan or when the apartment is charged under the National Land Code upon the issue of title to it, whichever is the earlier. By that time their suit might encounter problems of limitation.

A Second Ground: Notice Of Intention To Claim Compensation

Vacant possession of the apartment should have been given on 13 December 1997. It was not given on that date. According to para. 6(iii) of the respondents' statement of claim, the date of delivery of vacant possession was 15 September 1998, which was the date of the appellants' notice of delivery of vacant possession. It is not disputed that the respondents responded to the notice and took vacant possession accordingly.

Learned counsel for the appellants submitted that according to s. 56(3) of the Contracts Act 1950 the respondents cannot claim compensation for late delivery of vacant possession because at the time when they took vacant possession they did not give to the appellants notice of their intention to claim compensation.

Subsection (1) of s. 56 provides as follows:

> When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

As the intention of the appellants and the respondents was that time should be of the essence of the contract, the agreement became voidable at the option of the respondents when the appellants failed to deliver vacant possession on 13 December 1997.

Subsection (3) then comes into play. It says:

> If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of the promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of the acceptance, he gives notice to the promisor of his intention to do so.

The subsection applies "If ... the promisee accepts performance of the promise at any time other than that agreed". Where it applies, the promisee cannot claim compensation unless he gives notice of his intention to do so and the notice is given "at the time of the acceptance", that is, at the time when he "accepts performance of the promise at any time other than that agreed".

The question to be answered in this case is, did the respondents accept performance of the appellants' promise at any time other than that agreed, that is, at any time other than 13 December 1997?

Learned counsel for the appellants' stand is that by taking delivery of vacant possession on 15 September 1998 the respondents accepted performance of the appellants' promise at a time other than the agreed date 13 December 1997, and that since on 15 September 1998 the respondents did not give notice of intention to claim compensation for late delivery, they cannot claim compensation.

In my opinion, the words "at any time other than that agreed" do not refer to the act of accepting performance of the promise but refer to the performance of the promise itself. The words "If ... the promisee accepts performance of the promise at any time other than that agreed" do not mean that performance has been delayed but is now completed and the promisee now, at a time later than the agreed time, accepts the performance. If that were so, and the promisee now gives notice of intention to claim compensation, the notice cannot be of any practical use to the promisor, except to enable him to know in advance that there will be a claim against him and he had better get ready with money to pay his lawyers and the promisee if the promisee should succeed, which I do not think is the intended purpose of the notice. The phrase really means, in my opinion, the promisee accepting, meaning agreeing, that the promisor who has been in breach as to time may perform his promise at some other time, which has to be a time later than the time of the promisee's

so agreeing. At the time of the promisee's so agreeing, the performance has not been completed yet. The promisee says, "It's alright. Although the contract is now voidable because of your delay, I will not void it. You may complete it later, on such and such a date". At the time that he says so, the promisee, if he wants to claim compensation for the delay, must give notice of his intention to claim compensation, otherwise the promisor is entitled to assume that he will not be liable to any compensation. The notice is important as it will enable him to come to a commercial decision whether it is viable for him to go on performing if he is going to have to pay compensation.

In my opinion, sub-s. (3) does not apply to the respondents unless when the contract became voidable on 13 December 1997, or soon after that, they indicated to the appellants that it was acceptable to them if the appellants fulfilled their promise at some other time. There is no evidence as to that.

Third Ground: Proof Of Damages

The appellants contend, relying on s. 75 of the Contracts Act 1950 and the decision of the Federal Court in *Selva Kumar a/l Murugiah v. Thiagarajah a/l Retnasamy* [1995] 2 CLJ 374, that the respondents are not entitled to summary judgment because they have not adduced evidence of the actual loss or damage suffered by them as a result of the delay in completion.

Section 75 provides as follows:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

It is about breach of contract where either of two circumstances are present. One circumstance is where "a sum is named in the contract as the amount to be paid" for the breach. The other is "if the contract contains any other stipulation by way of penalty". It provides for the party complaining of the breach to be entitled to reasonable compensation for the breach, but it must not exceed – so it may be equal to – the named sum or the stipulated penalty. And the party is so entitled "whether or not actual damage or loss is proved" to have been caused by the breach. Whether it is the circumstance of a named sum or of a stipulated penalty, the treatment is the same. Reasonable compensation is due. The ceiling is fixed at the named sum or the stipulated penalty. It is to be so whether or not actual damage or loss is proved. To me it means that even if actual damage or loss is not proved – either because there is no means of proving it or because the damage or loss is not calculable

in monetary terms – reasonable compensation must be paid, and in that case the concern of the court is to determine what is the reasonable compensation in the circumstances. It therefore makes no difference whether the agreed liquidated damages in this case were to be regarded as a named sum or as a stipulated penalty.

That is my understanding of s. 75, construing it literally.

In *Selva Kumar*, however, the Federal Court held as regards the words "whether or not actual damage or loss is proved to have been incurred thereby" that although they are "unambiguous and plain", "the literal construction should not be strictly adhered to and the words in question should be given a restricted or limited construction". See p. 382.

At p. 384 the Federal Court explained it by saying that those words "are limited or restricted to those cases where the court would find it difficult to assess damages for the actual damage or loss as distinct from or opposed to all other cases, when a plaintiff in each of them will have to prove the damages or the reasonable compensation or the actual damages or loss in the usual ways".

As to the first class of cases, the Federal Court held at p. 385 that "the precise attributes of such contracts in which it is difficult for a court to assess damages or the actual damage or loss are cases where there is no known measure of damages employable, and yet the evidence clearly shows some real loss inherently and such loss is not too remote, then the court ought to award, not nominal damages, but instead, substantial damages not exceeding the sum so named in the contractual provision; a sum which is reasonable and fair according to the court's good sense and fair play".

As to the second class of cases, the Federal Court held at p. 385 that "in any case where there is inherently any actual loss or damage from the evidence or nature of the claim and damage for such actual loss is not too remote and could be assessed by settled rules, any failure to bring in further evidence or to prove damages for such actual loss or damage, will result in the refusal of the court to award such damages despite the words in question".

Selva Kumar was a case of the sale of a medical practice for RM120,000 where the purchaser, having paid RM96,000 (leaving only RM24,000 to be paid by six monthly instalments) refused to go on paying and the vendor sought to forfeit the sum of RM96,000 as agreed liquidated damages for the purchaser's breach. The Federal Court treated the case as belonging to the second type, and since there had been no evidence to prove actual loss, it decided that the vendor was only entitled to forfeit RM12,000 of the sum of RM96,000, being 10% of the purchase price, which had been paid on the signing of the agreement and was treated as a deposit or earnest money.

It is therefore clear that the Federal Court in *Selva Kumar* did not decide that in every case falling under s. 75 there must be proof of actual loss or damage. In the first class of cases, even if there is no evidence of actual damage or loss, the court ought nevertheless to award "substantial damages not exceeding the sum so named in the contractual provision" being "a sum which is reasonable and fair according to the court's good sense and fair play". The first class of cases are cases where "the evidence clearly shows some real loss inherently and such loss is not too remote" but "it is difficult for a court to assess damages or the actual damage or loss" because "there is no known measure of damages employable".

In a great number of cases in this country, home-ownership is acquired through purchase from housing developers with the help of financing from financial institutions on the security of the property. The developer is paid the purchase price in specific stages according to the progress of construction. If there is delay in the completion of the construction, the purchaser may suffer in various ways. He may have to commence paying the loan instalments without getting the enjoyment of the house. If he is renting a house, he will have to pay both the rental and the loan instalments, whereas if there had been no delay in completion, he could have moved into his new house and pay the loan instalments, without also having to pay rental. If he bought the house as an investment, he would have been deprived of the rental that he would have got from renting out the house. The person who is already living in his own house but is hoping to live in a better new house, and rent out his present house, will be deprived of early enjoyment of the new house and the receipt of rental from his present house, while having to pay his loan instalments. Whatever may be the circumstances and intention of the house-buyer, it can be said that in every case a delay in completion would deprive the purchaser, for the period of the delay, at least of the rental that he would have got from the house had he chosen to rent it out. It would be a substantial loss in theory. But how can he prove what the rental would be for the house, in the area and at the particular time, if, for example, the whole project is delayed so that there is no case on which to base a fair comparison?

Depending on the skill with which a claim is fought, a trial of the question of rentability may result in different awards of compensation in respect of different properties in the same housing development, whereas the delay suffered is the same. Moreover, there is the element of hardship in the case, for example, of the person who would have to pay both the rental of his present accommodation and the loan instalments. If there were no delay, he would have to pay only one thing. He is a man living on a tight budget. He will have to suffer something from having to pay for two things. How will his suffering be quantified?

For those reasons, I am of opinion that a case of delay in completion such as the present case should be treated as belonging to the first class of cases, which does not require proof of actual damage or loss. There has to be real loss that is not too remote, but it is difficult for the court to assess the actual loss because there is no known measure of damages employable. What the court needs to determine, in the absence of proof of actual loss, is what is the reasonable compensation, applying good sense and fair play.

As has been seen, the sale and purchase agreement in this case is a mandatory one that is prescribed by statute. The method of calculating the liquidated damages for failure to hand over vacant possession in time is prescribed in the agreement by regulations made by the Minister. I agree with learned counsel for the appellants that the method, being prescribed by subsidiary legislation, is incapable of overriding s. 75 and its effect. But in determining reasonable compensation under s. 75 the court ought not to disregard the fact that the Minister, in his wisdom balancing the interests of house-buyers and developers and after considering the advice of his advisers, considered that the method prescribed in cl. 22(2) is a fair method. I think it is highly desirable, to ensure fairness all round, that compensation for delay in the delivery of vacant possession of houses purchased from housing developers should be determined by a simple standard formula. That is what cl. 22(2) has provided. It prescribes a certain percentage per annum of the purchase price, which I think is an acceptable principle. The percentage is 10%. I do not see any point in arguing that the rate should instead be 9% or 8% or 7%. 10% does not strike me as excessive. As learned counsel for the respondents said, 10% is an acceptable benchmark in the business community.

The same applies to the formula in cl. 24(2) in respect of the common property, which employs a lower rate of 10% of 20% of the purchase price.

To conclude, I hold that the liquidated damages prescribed by cls. 22(2) and 24(2) constitute reasonable compensation and that the respondents ought to be given it in full to the limit prescribed.

As the appellants fail on all grounds, they fail to show that the respondents are not entitled to summary judgment. I dismiss the appeal with costs.